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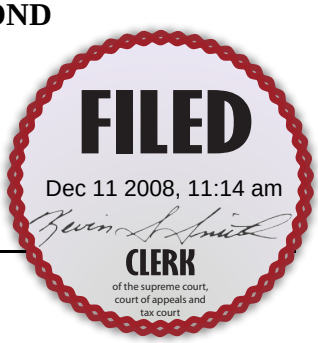

IN THE
COURT OF APPEALS OF INDIANA

JOHN M. STULL, BETTY J. STULL, and TRAVIS W. PICKAVET TRUST,	)	
Appellants-Plaintiffs/ Cross-Appellees-Counterclaim-Defendants,	)	
vs.	)	No. 50A04-0806-CV-325
JOHN A. WOLFF and ROSEMARY WOLFF,	)	
Appellees-Defendants/ Cross-Appellants-Counterclaim-Plaintiffs.	)	

APPEAL FROM THE MARSHALL CIRCUIT COURT
The Honorable Rex L. Reed, Special Judge
Cause No. 50C01-9804-CP-38

December 11, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

CRONE, Judge

Case Summary

John M. Stull, Betty J. Stull, and Travis W. Pickavet Trust (collectively referred to as "the Stulls") appeal the judgment against them and in favor of John A. Wolff and Rosemary Wolff on the Stulls' complaint for trespass and the Wolffs' counterclaim for trespass. The Wolffs cross-appeal the denial of Rosemary's request for attorney's fees. We affirm in part and reverse in part.

Issues

The Stulls raise four issues, which we consolidate and rephrase as follows:

I. Whether the judgment is clearly erroneous.

In their cross-appeal, the Wolffs present the following restated issue:

II. Whether the trial court abused its discretion in failing to award attorney's fees to Rosemary.

Facts and Procedural History

The facts most favorable to the judgment follow. The Stulls and Wolffs own property adjacent to each other in Marshall County. The Stulls' property lies north and east of the Wolffs' property. The Stulls purchased their property in 1959. The Wolffs purchased their property in 1974, after Rosemary's father, the prior owner, passed away.

A few years after 1959, John Stull dug a drainage ditch in a location that he believed marked the property line between his and the Wolffs' property. He did not have the land surveyed prior to digging. In either 1978 or 1979, the Wolffs discovered the ditch.

In 1998, the Wolffs commissioned a survey of their property. The survey indicated that the southern portion of the ditch was on the Wolffs' property. As a result, John Wolff moved that portion of the ditch to coincide with the property line revealed by the survey.

On April 30, 1998, the Stulls filed a complaint against the Wolffs alleging trespass and tortious interference with property and requesting damages and injunctive relief. On June 29, 1998, the Wolffs filed a counterclaim alleging trespass and that the Stulls' claim against Rosemary was frivolous, unreasonable, and groundless, and therefore she was entitled to attorney's fees.

Following a bench trial, on March 18, 2008, the trial court issued findings of facts and conclusions thereon:

FINDINGS

….

4. That [the Wolffs] purchased the real estate described in Finding No. 3 from Howard W. Ross, Rosemary Wolff's father, John Wolff's father-in-law, following his death, October 10, 1974 or 1975.

….

7. That in the spring of 1978, [the Wolffs] discovered that a ditch had been dug on the land described in Finding No. 3, commencing at a point approximately 171 feet north of the southerly most point along the north-south boundary separating [the Wolffs'] property from the property owned by [the Stulls].

….

13. That [the Stulls] pushed out the north-south boundary fence from at least a point located 171 feet north of the southerly most point of the boundary line depositing the posts and fencing onto [the Wolffs'] land.

14. That in 1997, [the Stulls] sought to construct a boundary fence along the north-south line in conformity with the Indiana fencing laws.

15. That on or about January 21, 1998, a survey was conducted.

16. That the survey was a staked survey with rods placed at certain intervals along the property line.

17. That following the survey, [the Wolffs] cleared the land on the edge of their property and relocated the ditch so that the easterly most edge of the ditch was located against the westerly most edge of the [the Stulls'] land.

18. That [the Stulls] were aware of the fact that the portion of the ditch located upon [the Wolffs'] land was being relocated to the position it now occupies, but took no action to prevent its relocation.

19. That [Rosemary Wolff] filed a claim against [the Stulls] based upon the fact that [the Stulls'] claims against her were groundless, baseless and frivolous.

20. That [Rosemary Wolff], through her counsel, made demand that [the Stulls] dismiss their claim as to her. The Stulls refused to do so.

21. That [the Stulls] presented no evidence at trial which would support a claim against Rosemary Wolff.

22. That at the conclusion of the [Stulls'] evidence, the Court granted Rosemary Wolff's motion for judgment against [the Stulls].

23. That there is an east/west boundary line that separates the [Stulls'] land from the land owned by [the Wolffs].

24. That following the year 2000, [the Stulls] pushed out the fence along the east/west line, depositing the fence, fence post, brush, trees and trash onto [the Wolffs'] land.

25. That Plaintiff, John Stull, dug a ditch along the east/west boundary line and then constructed a fence along the boundary line to the north of the ditch.

26. That at no time did [the Wolffs] give permission to [the Stulls] to construct a ditch on their land.

27. That [the Wolffs] have been damaged by [the Stulls'] acts of trespass.

28. That [the Wolffs] did not commit trespass upon [the Stulls'] land.

CONCLUSIONS

….

2. [The Stulls] trespassed onto [the Wolffs'] property between 1978 and 1979 when, without permission, [the Stulls] dug a ditch on [the Wolffs'] property.

3. [The Stulls] trespassed upon [the Wolffs'] land during 2000 when they pushed logs, fencing, bush and rubbish onto [the Wolffs'] land along the east/west boundary.

4. [The Stulls] trespassed upon [the Wolffs'] land when they caused a ditch to be dug on [the Wolffs'] land along the east/west boundary.

5. That [the Wolffs] did not commit trespass upon lands belonging to [the Stulls].

6. That [the Wolffs] are entitled to money damages in the sums of $7,000 against [the Stulls], jointly and severally [.]

7. That [the Stulls'] claims against [the Wolffs], and each of them, are without merit.

8. That [the Wolffs] are entitled to judgment against [the Stulls], jointly and severally.

….

IT IS NOW, THEREFORE, ORDERED that [the Wolffs] have and recover of and from [] John M. Stull, Betty J. Stull and Travis W. Pickavet, jointly and severally, upon their counterclaim the sum of Eight Thousand Dollars ($8,000.00).

> **IT IS FURTHER ORDERED** that while [Rosemary Wolff] have judgment against [the Stulls] but that she have and take nothing by virtue of said judgment, other than the judgment above.

Appellants' Br. at 7-11.

On March 25, 2008, the Wolffs, by counsel, sent a letter to the trial court asking it to clarify the discrepancy between the amount of damages set forth in conclusion 6 and the amount awarded. Appellees' App. at 1-2. On March 27, 2008, the trial court responded with a letter sent to both parties indicating that the amount of damages set forth in conclusion 6 was a scrivener's error and that "the judgment and docket entry reciting $8,000.00 are correct." *Id*. at 3. Also, the March 31, 2008, entry in the chronological case summary reads, "Special Judge Reed files copy of letter to [the Wolffs' counsel] concerning numbered 6 on judgment." Appellants' App. at 7. On April 11, 2008, the Stulls filed a motion to correct error, which included an allegation that the amount of damages in the findings do not match the amount of the judgment. *Id*. at 29-30. The trial court denied the Stulls' motion. The Stulls appeal, and the Wolffs cross-appeal.

Discussion and Decision

I. The Stulls' Appeal

Where, as here, the trial court issues findings of fact and conclusions thereon pursuant to Indiana Trial Rule 52, our standard of review is a two-step process. We first determine whether the evidence supports the findings, and then we assess whether the findings support the judgment. *Truelove v. Truelove*, 855 N.E.2d 311, 314 (Ind. Ct. App. 2006). We will set aside the findings or the judgment only if they are clearly erroneous. *Id*. Findings of fact are

clearly erroneous if the record lacks any evidence or reasonable inferences to support them. *Id*. The trial court's judgment is clearly erroneous when it is unsupported by the findings of fact and the conclusions relying on those findings. *Id*. "We neither reweigh the evidence nor assess the credibility of witnesses, but consider only the evidence most favorable to the judgment." *Staresnick v. Staresnick*, 830 N.E.2d 127, 131 (Ind. Ct. App. 2005).

The Stulls first challenge specific findings. Specifically, they argue that there is no evidence to support finding 17 and that there is no evidence that either Betty or the Travis W. Pickavet Trust ("the Trust") committed the acts in findings 11, 13, 17, 18, 24, and 27.

Finding 17 states that the relocated ditch "was located against the westerly most edge of [the Stulls'] land. Appellants' Br. at 9. The Stulls contend that the evidence shows that the "previous ditch line was established as the dividing line between the parties" and that they "owned their side by adverse possession, if for no other reason." *Id*. at 4. To the contrary, to determine whether the parties' allegations of trespass were valid, the trial court first had to determine where the boundary between the parties' properties was located. Furthermore, the Stulls did not allege an adverse possession argument in their complaint nor raise the issue before the trial court. "Failure to raise an issue before the trial court will result in waiver of that issue." *Van Winkle v. Nash*, 761 N.E.2d 856, 859 (Ind. Ct. App. 2002). Therefore, we decline to address this argument on appeal.[1]

[1] The Stulls also argue that finding 18 is unsupported by the evidence. Finding 18 states that the Stulls took no action to prevent the relocation of the ditch. Assuming, without deciding, that this finding is clearly erroneous, it is mere surplusage and therefore harmless.

As to findings 11, 13, 17, 18, 24, and 27, we agree that the evidence does not support a finding that Betty and the Trust participated in the stated actions. The Wolffs argue that John Stull dug the original ditch as well as deposited fencing and debris on their property, but make no attempt to argue that Betty and the Trust participated in or are otherwise legally responsible for John Stull's actions. Additionally, the Wolffs' counterclaim named only John Stull as the counter-defendant. Appellants' App. at 21. We therefore find the judgment in this regard to be clearly erroneous and therefore reverse as to Betty and the Trust on the Wolffs' counterclaim.

The Stulls also argue that the findings and conclusions do not support the judgment against John Stull on the Wolffs' trespass counterclaim. "Trespass is defined as 'An unlawful interference with one's person, property, or rights.... Any unauthorized intrusion or invasion of private premises or land of another.'" *Travelers Indem. Co. v. Summit Corp. of America*, 715 N.E.2d 926, 937 n.15 (Ind. Ct. App. 1999) (quoting BLACK'S LAW DICTIONARY, 1502 (6th ed. 1990)).

Specifically, the Stulls argue that finding 24 pertains to actions taken in 2000 and that the Wolffs "cannot rely on alleged actions occurring two years after the pleadings to support the pleadings." Appellants' Br. at 5. We observe that during John Wolff's direct examination, the Stulls did not object to his testimony regarding the 2000 actions. Indiana Trial Rule 15(B) provides in relevant part, "When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings." Notice may be implied where the evidence presented at trial is such that a reasonably competent attorney would have recognized the unpled issue as being litigated.

Samar, Inc. v. Hofferth, 726 N.E.2d 1286, 1291 (Ind. Ct. App. 2000). Further, when the trial has ended without objection as to the course it took, *the evidence is the controlling factor* in awarding relief to the parties based upon the applicable rules of substantive law. *Huffman v. Foreman*, 163 Ind. App. 263, 275, 323 N.E.2d 651, 658 (1975) (emphasis added).

Here, we conclude that John Wolff's aforementioned testimony is reasonably recognizable as relevant to the Wolffs' allegation of trespass. As such, we find that the evidence was litigated by the implied consent of the parties. *See State v. Gradison*, 178 Ind. App. 167, 172-73, 381 N.E.2d 1259, 1262-63 (Ind. Ct. App. 1978) (where exhibits showing both parcels of landowner's property were introduced into evidence without objection in proceeding for appropriation of real estate, theory of trial inevitably became concerned with entire tract of land which was made up of two legal descriptions, and thus any conflict in legal description and drawing and complaint was cured by the evidence).

Additionally, the Stulls contend that the statute of limitations for trespass has run on the Stulls' 1978-79 ditch digging along the north-south boundary, and therefore, it cannot be used to establish that John Stull trespassed on the Wolffs' property. The Stulls have waived this argument by failing to raise it before the trial court. *See Van Winkle*, 761 N.E.2d at 859. Accordingly, we reject the Stulls' contention that the findings do not support the judgment against John Stull and in favor of the Wolffs on their trespass counterclaim.

Finally, the Stulls assert that the judgment award of $8,000.00 is not supported by the findings and conclusions. They observe that conclusion 6 states that the Wolffs are "entitled to money damages in the sum of $7,000.00." Appellants' Br. at 10. The Wolffs direct our

attention to the exchange of letters between their counsel and the trial court, which, they argue, demonstrates that conclusion 6 is a scrivener's error. We agree. The trial court's March 27, 2008, letter, which was sent to both parties, is analogous to a nunc pro tunc order, and we will treat it as such. A nunc pro tunc order is "'an entry made now of something which was actually previously done, to have effect as of the former date.'" *Brimhall v. Brewster*, 835 N.E.2d 593, 597 (Ind. Ct. App. 2005) (quoting *Cotton v. State*, 658 N.E.2d 898, 900 (Ind. 1995)), *trans. denied* (2006). Additionally, Indiana Trial Rule 60(A) permits a trial court to correct clerical mistakes in judgments, orders, or other parts of the record any time before the notice of completion of clerk's record is filed under Appellate Rule 8. The trial court's letter complies with this rule. The Stulls do not claim that they did not receive a copy of the trial court's letter. Rather, they complain that the judgment was not actually corrected. Reply Br. at 2. We will not elevate form over substance, where as here, both parties timely received the trial court's letter informing them that a scrivener's error had occurred.

In addition, the Stulls baldly assert that there is no evidence to support a conclusion that the Wolffs' suffered damages in the amount of $8,000.00. *Id*. They fail to support their assertion with any citation to the record. As such, this argument is waived. *See* Ind. Appellate Rule 46(A)(8); *Boyd v. State*, 866 N.E.2d 855, 856 n.1 (Ind. Ct. App. 2007) (noting that the failure to put forth a cogent argument acts as a waiver of the issue on appeal), *trans. denied*. Therefore, we affirm the award of $8,000.00.

II. The Wolffs' Cross-appeal

The Wolffs contend that the trial court erred in failing to award attorney's fees to Rosemary. Indiana Code Section 34-52-1-1(b) provides,

> In any civil action, the court *may* award attorney's fees as part of the cost to the prevailing party, if the court finds that either party:
> (1) brought the action or defense on a claim or defense that is frivolous, unreasonable, or groundless;
> (2) continued to litigate the action or defense after the party's claim or defense clearly became frivolous, unreasonable, or groundless; or
> (3) litigated the action in bad faith.

(Emphasis added.)

Specifically, the Wolffs argue that Rosemary is *entitled* to attorney's fees because the claims against her were frivolous, unreasonable and groundless. However, the decision whether to award attorney's fees pursuant to Indiana Code Section 34-52-1-1(b) lies within the sound discretion of the trial court. *Breining v. Harkness*, 872 N.E.2d 155, 161 (Ind. Ct. App. 2007), *trans. denied* (2008). We note that the Wolffs have not presented any argument that the trial court abused its discretion in failing to award attorney's fees to Rosemary. Accordingly, the Wolffs' argument that Rosemary is entitled to attorney's fees must fail.

In sum, we affirm the judgment against John Stull and in favor of the Wolffs on the Wolffs' trespass counterclaim, the award of $8,000.00, and the denial of Rosemary's request for attorney's fees. We reverse the trial court's judgment against Betty and the Trust on the Wolffs' trespass counterclaim.

Affirmed in part and reversed in part.

KIRSCH, J., and VAIDIK, J., concur.